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10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA
 12 WESTERN DIVISION

13 THE WIMBLEDON FUND, SPC
 14 (CLASS TT),

15 Plaintiff,

16 v.

17 GRAYBOX, LLC; INTEGRATED
 ADMINISTRATION; EUGENE SCHER,
 18 AS TRUSTEE OF BERGSTEIN TRUST;
 AND CASCADE TECHNOLOGIES
 19 CORP.,

20 Defendants.

21 AND RELATED CONSOLIDATED
 22 ACTION AND THIRD PARTY
 23 COMPLAINT.

CASE NO.: 2:15-CV-6633-CAS-AJWx

DISCOVERY MATTER

Hon. Andrew J. Wistrich

**EX PARTE APPLICATION TO FOR
 A PROTECTIVE ORDER STAY
 PRODUCTION OF DOCUMENTS
 BY BANK OF AMERICA PENDING
 RESOLUTION OF MOTION TO
 QUASH SUBPOENA OR FOR
 PROTECTIVE ORDER, OR,
 ALTERNATIVELY, TO QUASH
 SUBPOENA; MEMORANDUM OF
 POINTS AND AUTHORITIES**

(Filed Concurrently with: (1)
 Declaration of David Bergstein; (2)
 Declaration of Richard W. Buckner; (3)
 [Proposed] Order

DATE: NA
 COURTROOM: Courtroom 690
 (Roybal)
 Date Filed: August 28, 2015
 Discovery Cutoff: March 31, 2017
 Final Pretrial Conf.: October 2, 2017
 Trial Date: October 24, 2017

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that Defendants David Bergstein and Graybox, LLC
 3 (collectively, the “Moving Parties”) hereby apply *ex parte* for a protective order
 4 staying production by Bank of America of certain documents related to Graybox
 5 pending this Court’s ruling on a motion to quash the subpoena issued by Wimbledon
 6 seeking those documents or, alternatively, a protective order. The particular
 7 document requests at issue are as follows:

8 3. Any and all account statements, records, wire transfers, and
 9 documents concerning any account from November 11 2011 through the
 10 present date in the name of Graybox.

11

12 6. All documents and communications concerning any account from
 13 November 2011 through the present date in the name of Graybox.

14

15 9. All documents and communications between You and Bergstein
 16 concerning any account from November 2011 through the present date in
 17 the name of Graybox.

18

19 13. All documents and communications evidencing the identity of the
 20 individual(s) who made and/or authorized any withdrawals from any
 21 account in the name of Graybox from any of Your branch locations.

22 Declaration of Richard W. Buckner, Ex. A. As can be seen, these requests seek
 23 essentially every scrap of financial information and all banking records related to
 24 Graybox in Bank of America’s possession for a period of nearly five years up to and
 25 including the present. No effort was made to limit the requests to the relevant time
 26 period (which ended in 2012) or to limit the requests by subject matter or party so as
 27 to avoid production of irrelevant materials and confidential or private matters such as
 28 payments to lawyers, charitable donations, tax payments, political contributions,

1 medical payments, or other payments having nothing to do with this litigation. Most
 2 if not all of the materials sought are irrelevant to this litigation. Moreover, this
 3 information falls within the scope of Graybox's privacy rights and, because Bergstein
 4 is the sole manager and owner of Graybox who participates in investments through
 5 that entity, it also falls within the scope of Bergstein's privacy rights. Revealing such
 6 materials to the public would be unfairly and needlessly damaging to Graybox and
 7 Bergstein. See Declaration of David R. Bergstein at ¶¶ 2-4. Those privacy rights
 8 outweigh any relevance for such massive and broad requests.

9 There is an additional reason to protect Graybox's and Bergstein's rights
 10 regarding the bank records being sought. As detailed in the accompanying deposition
 11 testimony of Bergstein's former counsel, Alex Weingarten, Wimbledon's counsel has
 12 engaged in improper efforts to obtain Bergstein's privileged and confidential
 13 information. Buckner Decl. ¶¶ 6-8 and Exs. D, E. Moreover, Wimbledon has shown
 14 a penchant for suing attorneys who have represented Bergstein and related entities
 15 (Aaron Grunfeld and the Law Offices of Henry Jannol are attorneys who have
 16 represented Bergstein or related entities in the past and have been named as
 17 defendants by Wimbledon in these consolidated actions). Allowing Wimbledon and
 18 its counsel access to Graybox's and Bergstein's private information would risk
 19 misuse of that information.

20 The subpoena to Bank of America has a return date of September 19, 2016 and
 21 we have been informed that the Bank will produce the requested documents on that
 22 date absent the filing of a motion to stay or quash on or before September 16, 2016 at
 23 4:00 p.m. Eastern. Buckner Decl. at ¶ 2, 3. Graybox and Bergstein intend to file a
 24 motion to quash the subpoena as to the above-quoted requests or, alternatively, for a
 25 protective order but there is not sufficient time to do so before September 19, 2016
 26 while complying with the Joint Stipulation provisions of Local Rule 37. *Id.* Counsel
 27 for Graybox and Bergstein and counsel for Wimbledon held the conference required
 28 by Local Rule 37 on September 13, 2016 but were unable to resolve the dispute. *Id.*

1 at ¶ 2. Counsel for Graybox and Bergstein will provide their portion of the Joint
2 Stipulation called for by Local Rule 37 no later than Friday, September 16, 2016 with
3 Wimbledon's portion of the Joint Stipulation due seven days later. *Id.* at ¶ 2.
4 Counsel for Graybox and Bergstein will then promptly file the motion to quash or for
5 a protective order.

6 Counsel for Graybox and Bergstein have also requested that Wimbledon agree
7 that Bank of America's production of documents in response to the above-quoted
8 requests be stayed pending the Court's ruling on the motion to quash or for a
9 protective order but it has refused to do so. *Id.* Accordingly, Graybox and Bergstein
10 file this *Ex Parte* Application seeking a stay of the production to permit the Court to
11 rule on that motion or for a protective order barring production pending resolution of
12 their motion to quash the subpoena as to the requests quoted above.

13 Unless the stay sought by this Application is granted, Wimbledon may receive
14 a great deal of information that is both irrelevant and subject to Graybox's and
15 Bergstein's confidentiality and privacy rights.

16 This Application is made following notice given pursuant to Local Rule 7-19.1.
17 See Buckner Decl. ¶ 2. Wimbledon's counsel has said it will oppose this application.
18 *Id.* The names, address, telephone number, and e-mail addresses of Wimbledon's
19 counsel are:

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This Application is based on this Application, the attached Memorandum of Points and Authorities, the accompanying Declarations of David Bergstein and Richard W. Buckner, and the other papers, records, and files in this case.

DATED: September 15, 2016

PATRICIA L. GLASER
G. JILL BASINGER
RICHARD W. BUCKNER
CAMILLA Y. CHAN
GLASER WEIL FINK HOWARD AVCHEN &
SHAPIRO LLP

By: /s/ Richard W. Buckner
Richard W. Buckner
Attorneys for Defendants Graybox, LLC
and David Bergstein

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Plaintiff The Wimbledon Fund, SPC (Class TT) (“Wimbledon”) brought these consolidated actions against Graybox and David Bergstein (collectively, the “Moving Parties”) and others seeking to hold Bergstein liable for a default judgment Wimbledon obtained against Swartz IP Services Group Inc. (“SIP”) and seeking to hold Graybox liable for certain allegedly fraudulent transfers it supposedly received. Wimbledon premises its claim against Bergstein on the false theory that Bergstein is the alter ego of SIP and thus liable for its debts. As to Graybox, Wimbledon asserts, wrongly, that Graybox was the recipient of fraudulent transfers from SIP in 2011 and 2012 and Wimbledon seeks recovery of those allegedly fraudulent transfers. Declaration of Richard W. Buckner, Exhibits B and C. Bergstein is the sole manager and owner of Graybox. Declaration of David R. Bergstein Decl. at ¶ 2. In truth, Bergstein is not and never was the alter ego of SIP, and neither Graybox nor Bergstein was ever the recipient of any fraudulent transfers from SIP.

To be clear, this Application is not about efforts to prevent access to SIP’s banking records to explore the allegedly fraudulent transfers it supposedly made or to explore its relationship with Bergstein in connection with Wimbledon’s alter ego allegations. The subpoena to Bank of America seeks SIP’s banking records, but the Moving Parties are not resisting that discovery. Rather, this Application only relates to Graybox banking records which are either entirely irrelevant to Wimbledon’s fraudulent transfer and alter ego claims, or, to the extent relevant at all, Wimbledon already possesses because they were used by the parties in prior motion for a preliminary injunction.

For example, Wimbledon seeks all of Graybox’s banking records from November 2011 to the present. But all but one of the twenty specific allegedly fraudulent transfers to Graybox by SIP occurred in 2011 and 2012 (Plaintiff’s Motion for Preliminary Injunction, etc. (Dkt 16) at 4), and SIP conducted no operations at all

1 after February 2013. Buckner, Ex. B at ¶ 32. Yet Wimbledon seeks all of Graybox's
 2 banking records, not just for 2011 and 2012, but for 2013, 2014, 2015, and 2016 to
 3 the present. Those records can have nothing at all to do with Wimbledon's fraudulent
 4 transfer claims. Moreover, Wimbledon already has the relevant Graybox banking
 5 records from 2011 and 2012 related to SIP. *See, e.g.*, Declaration of David Bergstein
 6 dated September 25, 2015 (Dkt 50-2) at ¶¶ 8,9; Exhibits to Declaration of David
 7 Bergstein dated September 25, 2015 (Dkt 51-1), Exs. 5, 6). Wimbledon has no
 8 legitimate need for Graybox banking records on the fraudulent conveyance claim;
 9 even if had a need for some of the Graybox banking records, it clearly would have a
 10 need only for those records associated with the specific 2011 and 2012 transfers from
 11 SIP to Graybox. But Wimbledon has made no effort to limit its requests in that way.

12 Moreover, and most fundamentally, Wimbledon has no need even for the
 13 Graybox banking records related to the specific allegedly fraudulent transfers from
 14 SIP to Graybox, not only because it already has the relevant records, but also because,
 15 as detailed in the Factual Background section below, Graybox has already provided
 16 the contracts and invoices and banking records showing the allegedly fraudulent
 17 transfers to SIP to have been proper. Wimbledon has failed to refute those backup
 18 materials.

19 Nor are the Graybox banking records in any way relevant to Wimbledon's
 20 alter ego claim against Bergstein. By that claim, Wimbledon asserts that Bergstein is
 21 the alter ego of **SIP** and so is liable for **SIP's** liabilities. But Graybox's banking
 22 records have nothing to do with whether Bergstein is SIP's alter ego. SIP's banking
 23 records conceivably could be relevant to that issue but Graybox and Bergstein are not
 24 objecting to the production of SIP's banking records.

25 In addition, the Graybox banking records contain private, financial information
 26 that should be protected from disclosure unless its relevance outweighs privacy
 27 concerns. As we have shown, the Graybox banking records, to the extent they have
 28 not already been provided in connection with the preliminary injunction motion in

this case, are irrelevant, and privacy interests counsel against production.

II. FACTUAL BACKGROUND

A. SIP's Investment Activities

Briefly, Wimbledon, working through its agent Weston Capital Management, LLC and/or Weston Capital Asset Management LLC (collectively, "Weston") purchased \$17.7 million in notes from SIP as to which SIP ultimately defaulted, leading to the above referenced default judgment. Notwithstanding Wimbledon's claims, however, SIP was not a mere shell through which Bergstein conducted business but was instead an active company investing the Wimbledon note proceeds in an effort to generate sufficient revenue to repay the Wimbledon notes. That those investments were not successful is unfortunate but not the result of wrongdoing by Bergstein or Graybox. In fact, the Graybox transactions challenged by Wimbledon were appropriate and Graybox provided reasonably equivalent value to SIP for the transfers it received.

More specifically, on December 10, 2010, SIP was formed to provide advisory services and to make investments. Dkt 50-2 at ¶ 3. SIP was an active company engaged in various investments at any given time. See Dkt 50-2, *passim*. Accordingly, SIP and Graybox thereafter entered into a Consulting Agreement under which Graybox would provide advisory and consulting services to SIP in exchange for a quarterly fee of at least \$50,000. Dkt 50-2 at ¶ 4; Dkt 51-1, Ex. 1. Thus, some of the transfers from SIP to Graybox challenged by Wimbledon were for the services Graybox provided under the Consulting Agreement. As to those transfers, SIP received reasonably equivalent value and they were thus not fraudulent transfers. See Cal. Civ. Code § 3439.04(b)(8). The same is true of the other transfers challenged by Wimbledon.

For example, on Wimbledon's behalf, Weston managed a number of investments, including an investment vehicle known as Arius Libra, the majority shareholder in an entity named Pineboard Holdings, Inc. Dkt 50-2 at ¶ 5; Dkt 51-1,

1 Ex. 2 at 11-16. On October 1, 2011, Graybox and Pineboard entered into a Funding
2 and Services Agreement (the “Pineboard Agreement”). Dkt 50-2 at ¶ 6; Dkt 51-1, Ex.
3 3. Pursuant to the Pineboard Agreement, Graybox provided various services to
4 Pineboard and advanced certain Pineboard expenses. In exchange, Graybox was paid
5 a monthly fee of \$20,000 and reimbursed for its advances. Dkt 50-2 at ¶¶ 1-7.

6 On or about November 18, 2011, SIP and Pineboard entered into a Securities
7 Purchase Agreement under which SIP purchased a \$5 million note. That agreement
8 specifically provides that the purchase price be paid with fifty percent up front and the
9 balance payable periodically thereafter. The agreement also provided that the
10 purchase price “[s]hall be delivered either to [Pineboard] or as directed by
11 [Pineboard] to third parties for the benefit of [Pineboard].” Dkt 50-2 at ¶ 7; Dkt 51-1,
12 Ex. 4 at ¶ 4(d). Thus, the Securities Purchase Agreement expressly contemplated
13 payments by SIP to third parties in satisfaction of SIP’s obligation to Pineboard to pay
14 the purchase price. It is therefore unsurprising that some of SIP’s appropriate
15 payments on Pineboard’s behalf were made to third parties, including Graybox.

16 Graybox regularly advanced funds for the benefit of Pineboard and submitted
17 invoices to Pineboard for payment. Dkt 50-2 at ¶ 8; Dkt 51-1, Ex. 5. Those invoices
18 were supported by wire-transfer receipts reflecting Graybox’s payments on
19 Pineboard’s behalf. Dkt 50-2 ¶ 9; Dkt 51-1, Ex. 6. In accordance with the Securities
20 Purchase Agreement, Pineboard would direct SIP to pay those invoices as a means of
21 repayment by SIP of the purchase price owed to Pineboard under that agreement. Dkt
22 50-2 at ¶ 8. Thus, the transfers by SIP to Graybox related to Pineboard were in
23 exchange for reasonably equivalent value and thus perfectly appropriate.

24 Similarly, to further its investment activities and to attempt to yield returns
25 sufficient to repay the Wimbledon notes, on or about July 2, 2012, SIP (now
26 operating under the name Advisory IP Services, Inc.) and Glendon Group, Inc.
27 entered into a Stock Purchase Agreement (the “Glendon SPA”). Dkt 50-2 at ¶ 10;
28 Dkt 51-1, Exs. 7, 8. Under that agreement, SIP agreed to purchase 1.2 million shares

1 of Glendon common stock for \$1 million. *Id.*, Ex. 7 at § 1.2. To facilitate SIP's
2 investment in Glendon, Graybox, SIP, and Weston (Wimbledon's agent) entered into
3 an agreement dated March 16, 2012 under which Graybox agreed to cause a loan to
4 be made to SIP in the amount of the \$1 million purchase price, up to \$900,000 of
5 which would be advanced to Graybox. Dkt 50-2 at ¶ 11; Dkt 51-1, Ex. 9. On April
6 19, 2012, the \$1 million loan to SIP was funded and, after SIP advanced the \$900,000
7 to Graybox as agreed, Graybox wired the \$1 million purchase price to Glendon. Dkt
8 50-2 at ¶ 11; Dkt 51-1, Exs. 10, 12. Again, SIP received reasonably equivalent value
9 for the \$900,000 provided to Graybox.

10 As is clear from the discussion above, SIP was an active company with active
11 investments, information that was available to Wimbledon at the time through its
12 agent Weston. Moreover, in addition to the above investments, the vast bulk of SIP's
13 other transfers were transfers to Wimbledon or Weston totaling at least \$7,275,675,
14 including a \$1 million redemption payment to Wimbledon on the SIP notes it had
15 purchased. Dkt 50-2 at ¶ 16; Dkt 51-1, Exs. 13-20.¹

16 In short, the SIP transfers to Graybox were documented and proper; there is no
17 basis for an subpoena seeking wholesale production of all Graybox bank records, the
18 vast bulk of which have nothing to do with this case.

19 **B. Wimbledon's Conduct and Effort to Obtain Confidential and**
20 **Privileged Materials**

21 Before addressing the specific document requests at issue, one more area needs
22 to be discussed. Wimbledon and its counsel have demonstrated a remarkable
23 penchant for suing Bergstein's and Graybox's lawyers, having named Aaron Grunfeld
24 and the Law Offices of Henry Jannol as defendants in these consolidated actions.
25 Ever more disturbing, however, it that Wimbledon's counsel has engaged in
26

27 _____
28 ¹ The Moving Parties acknowledge that the Court has issued a preliminary injunction
freezing certain Graybox funds notwithstanding the discussion in text. See Dkt 56.

1 remarkable, and improper, conduct in this litigation and so to allow the wholesale
2 turnover of Graybox bank records would be inappropriate.

3 Bergstein and Graybox were formerly represented by Susan Tregub as general
4 counsel. Tregub had been Bergstein's long-time attorney but ultimately she and
5 Bergstein had disagreements. Remarkably, Tregub allowed those disagreements to
6 cause her to depart from her ethical and legal obligations as an attorney to a stunning
7 degree. Tregub betrayed Bergstein, providing his confidential and privileged
8 information to his "mortal enemy" and litigation adversary in scores of cases, and
9 going so far as to secretly act as counsel against Bergstein and for his litigation
10 adversary – while still formally representing Bergstein and his related entities as
11 counsel – to force certain Bergstein related entities into involuntary bankruptcy.
12 Buckner Decl. Ex. C (Weingarten Deposition at 12:12-13:15). As a result of her
13 actions against Bergstein and affiliated companies, Tregub suffered a judgment of \$50
14 million for legal malpractice and breach of fiduciary duty. Declaration of Anthony R.
15 Bisconti (Dkt 50-4 at ¶¶ 4, 11; Dkt 50-5, Exs. 1, 8).

16 During the course of this litigation, counsel for Graybox and Bergstein received
17 information suggesting that Wimbledon's counsel, James Walker, may have
18 attempted to convince Bergstein's prior counsel, Alex Weingarten, to engage in
19 similar misconduct toward his former clients, Bergstein and related entities. Rather
20 than rush off with unsubstantiated allegations against opposing counsel, Bergstein's
21 counsel noticed the deposition of Alex Weingarten to determine whether what they
22 had heard was true and to make a record of what actually happened.

23 Bergstein's counsel noticed the Weingarten deposition for June 30, 2016.
24 Wimbledon's counsel requested that the deposition be delayed but Bergstein's
25 counsel declined. When Wimbledon's counsel asked why Bergstein's counsel
26 insisted on proceeding with the deposition, they informed him that they had received
27 information that Wimbledon's counsel may have attempted to intimidate Bergstein's
28 former counsel, Weingarten, and that they needed to proceed to determine if there

1 were any truth to that. Wimbledon then purported to itself notice the Weingarten
2 deposition for June 30, 2016. Buckner Decl. at ¶ 6. A few days before the
3 deposition, Weingarten said a conflict had arisen and the deposition would need to be
4 rescheduled. Wimbledon's counsel refused to agree to reschedule and announced it
5 intended to appear at the scheduled time and place, take Weingarten's notice of non-
6 appearance, and pursue its remedies against him. *Id.* In so doing, Wimbledon's
7 counsel indicated that Walker, located in Texas, had changed his travel plans and
8 would not attend but that Wimbledon's local counsel from the Pachulski firm would
9 appear with a court reporter and videographer to take the notice of non-appearance.
10 *Id.* In reliance on Wimbledon's counsel's statement that Wimbledon would provide a
11 court reporter and videographer, Bergstein's counsel cancelled the arrangements he
12 had made for those services. *Id.* After this, Weingarten informed the parties that he
13 was able to change his schedule in light of the position taken by Wimbledon's counsel
14 and appear for deposition on June 30, 2016 as scheduled. Buckner Decl. at ¶ 7.

15 Wimbledon's counsel from the Pachulski firm, Jeffrey Kandel, appeared at the
16 deposition with a court reporter but no videographer. Weingarten appeared as did
17 counsel for Bergstein and Graybox, Richard Buckner. This is what happened at the
18 beginning of the deposition:

19 MR. KANDEL: We're on the record.

20 We are here for the deposition of Alex M. Weingarten.

21 And for the record, my name is Jeffrey Kandel, with Pachulski
22 Stang Ziehl & Jones, co-counsel to Plaintiff, The Wimbledon Fund.

23 In the room with us is Mr. Weingarten, Alex M. Weingarten, and
24 Richard Buckner, of Glaser Weil, attorneys for Defendants David
25 Bergstein and Aaron Grunfeld.

26 MR. BUCKNER: And also Graybox, and Eugene Scher as
27 Trustee for David Bergstein.

28 MR. KANDEL: Thank you for the clarification.

1 Mr. Weingarten had previously stated that he would not be
2 available for the deposition this morning.

3 And in reliance on those statements, Jim Walker, from Texas,
4 stated in his e-mail yesterday that he would accordingly be canceling his
5 travel plans, and that we would be here today merely to note Mr.
6 Weingarten's nonappearance for the record, as opposed to going forward
7 with the substantive deposition.

8 As a result, we will – of course, Mr. Weingarten is here, so we're
9 not going to take his Notice of Nonappearance.

10 We're not going to take his nonappearance. But we will continue
11 this deposition under the current subpoena to a later scheduled time.

12 And with that, we're done and off the record.

13 MR. BUCKNER: We're not done.

14 MR. KANDEL: You're not done?

15 MR. BUCKNER: I have questions.

16 MR. KANDEL: Well, this is my deposition and my court
17 reporter.

18 MR. BUCKNER: But you didn't – I also have the subpoena.

19 MR. KANDEL: That doesn't matter.

20 MR. BUCKNER: We're here for the deposition. I'm asking
21 questions.

22 MR. KANDEL: Thank you very much.

23 We're done.

24 Buckner Decl. Ex. D at 4:5-5:24. Thereafter, a very lengthy argument ensued
25 with counsel for Bergstein and Graybox insisting that the deposition proceed
26 with questioning and Wimbledon's counsel preventing it from occurring and
27 insisting on going off the record. Buckner Decl. Ex. D at 5:25-21:15. When
28 Bergstein's counsel offered to proceed with an express agreement that

1 Wimbledon would waive no rights by doing so, Wimbledon's counsel refused
2 the offer and would not say why. *Id.* Wimbledon's counsel refused
3 Bergstein's counsel's request to call the Magistrate Judge for guidance.
4 Buckner Decl. at ¶ 7. The court reporter who accompanied Kandel to the
5 deposition was put in an untenable position and ultimately declined to report
6 questioning at the deposition in light of Kandel's instruction. Counsel for
7 Bergstein and Graybox then told Wimbledon's counsel that he would arrange
8 his own court reporter and would proceed with questioning. After being so
9 warned, Wimbledon's counsel left and Bergstein's counsel proceeded with the
10 deposition questioning of Weingarten. Buckner Decl. at ¶¶ 7, 8.

11 The testimony was stunning. After Weingarten testified that he had
12 represented Bergstein and related entities in dozens of matters and explained
13 that he had telephoned Walker to discuss a possible offer aimed at giving
14 Weingarten access to the settlement funds frozen by this Court's preliminary
15 injunction, Weingarten gave this testimony about his dealings with
16 Wimbledon's counsel, James Walker:

17 Q. And what did Mr. Walker say to you in that conversation?

18 A. I don't remember his exact words, but the effect of his words
19 were that he was not interested in my offer; that if I wanted to intervene,
20 that he would welcome my involvement because it would make it that
21 much easier for him to depose me, conduct discovery, and ultimately sue
22 me.

23 Q. Did he mention Susan Tregub in that conversation?

24 A. He did. He told me then that – that he found it odd that I was
25 calling because he had recently had a conversation with Bergstein's
26 lawyers – and he didn't specifically identify who Bergstein's lawyers
27 were – and what he explained to me was that, quote, unquote,
28 Bergstein's lawyers were offering me up. And that was the actual word

1 that he used: were offering me up.²

2 He didn't explain specifically what he meant by that. And at that
3 point, I was kind of shocked, to be honest with you, so I didn't ask him
4 what he meant by that, but he said that they were offering me up and if I
5 was smart, that I would turn Susan Tregub and give him all the
6 information that they needed to be able to bury Bergstein.

7 Q. And what did you understand him to mean when he said you
8 should act like Susan Tregub?

9 A. Susan Tregub was previously an attorney for David Bergstein,
10 and she ended up betraying David Bergstein by taking all of his
11 confidential, privileged information and other aspects of information
12 about his life, and handing it over to his mortal enemy and acting as
13 counsel in actions against him to drag several companies that he was
14 involved with into involuntary bankruptcy.

15 And it was a whole – what she did was a breach of her ethical
16 duties as an attorney, incomprehensible to me, to be honest with you, but
17 she did it. She admitted she did it. It ended up resulting in a 50 million
18 dollar judgment against her as a result of her actions.

19 But what I understood him to mean was that he was asking me to
20 turn against David Bergstein, to give whatever information I had about
21 David and his business to them, being the plaintiffs, to assist them in the
22 prosecution of their case.

23

24 Q. In your experience, has anyone else ever suggested to you that
25 you should turn against a client like that?

26 A. No.

27
28 ² None of Bergstein's counsel ever "offered up" Weingarten.

1 Q. What was your reaction when Mr. Walker made that
2 suggestion?

3 A. I was shocked and surprised. He also suggested to me that if I
4 didn't, quote, smarten up, you know, that I was going to be in his
5 crosshairs.

6 So I asked him to clarify if what he was asking me to do was to
7 turn over privileged information about a former client, and then he hung
8 up.

9 Buckner Decl. Ex. E at 5:19-14:12 (footnote added).

10 Given this testimony, great care should be taken before Wimbledon is granted
11 access to private banking information, particularly given that much of what
12 Wimbledon seeks has nothing to do with this litigation.

13 **C. The Document Requests at Issue**

14 On or about August 18, 2016, Wimbledon served a very broad subpoena on
15 Bank of America seeking, among other things, virtually every document or electronic
16 file imaginable related to any account held by Graybox over a nearly five-year period.
17 Read literally, the subpoena would require production of documents reflecting every
18 single one of Graybox's banking transactions at Bank of America dating back through
19 November 2011. Absolutely no effort was made to limit the subpoena's reach to the
20 only conceivably relevant information: banking records related the twenty specific
21 allegedly fraudulent transfers from SIP to Graybox in 2011 and 2012.³ Instead,
22 Wimbledon demands everything. As relevant to this Application, Wimbledon's
23 subpoena seeks the following documents from Bank of America:

24 3. Any and all account statements, records, wire transfers, and
25 documents concerning any account from November 11 2011 through the
26

27 _____
28 ³ Wimbledon does allege a single allegedly fraudulent transfer of \$30,000 in
December 2013. Plaintiff's Motion for Preliminary Injunction, etc. (Dkt 16) at 4.

present date in the name of Graybox.

....

6. All documents and communications concerning any account from November 2011 through the present date in the name of Graybox.

....

9. All documents and communications between You and Bergstein concerning any account from November 2011 through the present date in the name of Graybox.

....

13. All documents and communications evidencing the identity of the individual(s) who made and/or authorized any withdrawals from any account in the name of Graybox from any of Your branch locations.

Buckner Decl. Exhibit A at 4 ¶ 3 and 5 ¶¶ 6, 9, 13.

III. ARGUMENT

The vast bulk of the documents called for by Wimbledon's subpoena to Bank of America are irrelevant (or, the ones relevant have already been provided in connection with the earlier preliminary injunction motion in this case) but, even to the extent they may have some marginal relevance, it is outweighed by Graybox's and Bergstein's privacy rights. For those reasons, the Moving Parties intend to file a motion with this Court to quash the subpoena as to the above-quoted requests or, at a minimum, to require that any production be pursuant to a Protective Order limiting dissemination and use of any materials produced to that which is essential to the prosecution of this litigation. By this Application, the Moving Parties seek only to stay Bank of America's production long enough for the Court to resolve the Moving Parties' motion to quash or for a protective order. Because the materials sought are irrelevant, or if marginally relevant any relevance is outweighed by Graybox's and Bergstein's privacy interests, the Court should stay Bank of America's production so that documents are not released before the Court can determine whether and to what

1 extent they are discoverable and, if so, what controls should be put in place to
2 regulate their use in this case.

3 **A. The Materials Sought are Irrelevant**

4 Obviously, irrelevant materials are not discoverable “Parties may obtain
5 discovery regarding any nonprivileged matter that is *relevant* to any party’s claim or
6 defense and proportional to the needs of the case. . . .” Fed. R. Civ. Proc. 26(b)
7 (emphasis added). If the Bank were to produce the requested records, the vast bulk, if
8 not all, of the materials produced would be entirely irrelevant to this litigation.
9 Wimbledon would receive records of every single Graybox banking transaction over
10 a nearly five-year period regardless whether it had anything to do with Wimbledon,
11 SIP, or any issues associated with Wimbledon’s purported fraudulent transfer claims
12 against Graybox or its purported alter ego claim against Bergstein. The requested
13 bank records would reveal a great deal about Graybox’s and Bergstein’s activities that
14 has nothing whatever to do with this case. Presumably, Wimbledon would receive
15 records of Graybox’s payments to its lawyers, its charitable contributions, its political
16 donations (if any), its membership dues to any organization of which it is a member,
17 and much, much more. But none of that would be relevant here or advance any
18 legitimate interest of Wimbledon.

19 As to Wimbledon’s fraudulent transfer claims, all save one (for \$30,000) was
20 alleged to have occurred in 2011 and 2012. In addition, SIP conducted no operations
21 after February 2013. Clearly, Graybox banking records from 2013, 2014, 2015, and
22 2016 have absolutely nothing to do with allegedly fraudulent transfers from SIP to
23 Graybox in 2011 and 2012. Moreover, the requests are not limited to banking
24 transactions involving SIP but seek records of all of Graybox’s banking transactions
25 which would show the identities of everyone from whom Graybox received money or
26 to whom Graybox sent money. There is no justification for such vastly overbroad
27 requests seeking obviously irrelevant materials.

28 In truth, Wimbledon already has access to all the banking records it needs to

litigate its fraudulent transfer claims against Graybox. Wimbledon has subpoenaed SIP's banking records and Graybox and Bergstein have no objection to Wimbledon's discovery directed toward SIP banking records. Wimbledon thus has the banking records it needs to show transfers from SIP to Graybox. In addition, Graybox provided relevant Bank of America banking records showing its disposition of funds received from SIP in connection with its opposition to Wimbledon's prior preliminary injunction motion. See Dkt 50-1 at ¶ 6; Dkt 51-1, Exs. 5, 6. It has no need for or right to other Graybox banking records.

Similarly, the Graybox bank records are entirely unrelated to whether or not Bergstein is SIP's alter ego as alleged by Wimbledon. To establish alter ego liability on Bergstein's part, Wimbledon must prove that (a) there is such a unity of interest and ownership between Bergstein and SIP that the individuality, or separateness, of Bergstein and SIP ceased to exist and (b) holding only SIP, and not Bergstein, liable for the default judgment against SIP would result in injustice. *See, e.g., Bollore S.A. v. Import Warehouse, Inc.*, 448 F.3d 317, 325 (5th Cir. 2006) (applying Texas law requiring stock ownership for alter ego liability); *Permian Petroleum Co. v. Petroleos Mexicanos*, 934 F.2d 635, 643 (5th Cir. 1991) (same); *Sonora Diamond Corp. v. Superior Court*, 83 Cal. App. 4th 523, 538 (2000) (stating unity of interest and injustice elements of alter ego liability). Graybox's bank records have nothing to do with either issue.⁴

B. The Materials Sought are Subject to Graybox's and Bergstein's Privacy Rights and Those Privacy Rights Outweigh any Relevance the Materials at Issue Might Have

Document Request No. 3, seeking all account statements, records, wire transfers, and documents concerning all Graybox accounts from November 2011

⁴ Wimbledon has obtained SIP bank records and has requested additional SIP bank records in the Bank of America subpoena. The Moving Parties are not opposing that discovery.

1 through the present is vastly overbroad and calls for essentially every document and
2 record related to Graybox's bank accounts. The same is true of (a) Request No. 6,
3 seeking all documents and communications regarding Graybox accounts from
4 November 2011 to the present, (b) Request No. 9, seeking all documents and
5 communications with Bergstein regarding Graybox accounts during the same period,
6 and, (c) Request No. 13, seeking all documents and communications "evidencing" the
7 identity of persons making or authorizing withdrawals from any Graybox account at
8 any time. Requiring disclosure of all of these materials would be invasive of the
9 privacy rights of Graybox and its sole manager, Bergstein. *See, e.g., Roberts v. Gulf*
10 *Oil Corp.*, 147 Cal. App. 3d 770, 796-97 (1983); Cal. Const., Art. 1, Sec. 1; *see also,*
11 *Wells Fargo Bank N.A. v. Iny*, No. 2:13-cv-01561-MMD-NJK, 2014 WL 1796216 (D.
12 Nev. May 6, 2014) (recognizing a privacy interest in bank records and entering a
13 protective order regulating use of such records).⁵ In determining whether to allow
14 discovery of such materials, the Court must balance relevance against privacy. *Id.*

15 Bergstein is now and has always been the sole member and owner of Graybox,
16 an entity that was formed in or around February 2000, long before any of the events at
17 issue in this litigation. Bergstein Decl. at ¶ 2. Graybox has a number of business
18 investments and projects that do not relate to any of the events at issue in this
19 litigation. *Id.* The bank account records being sought by Wimbledon will reflect
20 numerous business transactions spanning nearly five years from Graybox's bank
21 accounts that have no relationship to any issue in this litigation. The Graybox Bank
22 of America records will contain thousands of transactions relating to Graybox's and
23 Bergstein's private investment and financial activities unrelated to any issue in this
24 litigation. *Id.* at ¶ 3. These will include highly private information of a personal and
25

26
27 ⁵ While the subpoena is addressed to Bank of America, Graybox and Bergstein have
28 standing to move to quash or for a protective order because the subpoena seeks
information about them as to which they have a "personal right." *See, e.g., Transcor*
v. Furney Charters, Inc., 212 F.R.D. 588, 590-91 (D. Kan. 2003).

1 business nature, including but not limited to payments to lawyers, investment
2 activities, mortgage payments, rent payments, charitable donations, payments for
3 medical bills, and transfers of investment proceeds. Moreover, some of Bergstein's
4 personal funds are invested in projects or other investments Graybox administers.

5 Given that the Moving Parties believe that the vast bulk of the materials sought
6 by these Requests have nothing to do with this litigation and contain confidential and
7 private information, they believe the Court should quash the subpoena to Bank of
8 America as to Request Nos. 3, 6, 9, and 13. If the Court is unwilling to do so, the
9 Moving Parties nonetheless believe, at a minimum, that the Court should permit
10 production only pursuant to the Protective Order governing use of those materials and
11 barring their dissemination or use beyond that essential to the conduct of this
12 litigation. By this Application, the Moving Parties seek only to stay production of
13 materials called for by those Requests until the Court has ruled on the Moving
14 Parties' soon to be filed motion to quash or for a protective order.

15 **IV. CONCLUSION**

16 For all the foregoing reasons, the Moving Parties respectfully request that the
17 Court stay production by Bank of America of the documents called for by Request
18 Nos. 3, 6, 9, and 13 pending the Court's ruling on the Moving Parties' motion to
19 quash or for a protective order.

20
21 DATED: September 15, 2016

Respectfully submitted,
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